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In the
Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted]
1171

IMPERIAL REFINERIES OF MINNESOTA, INC.
Appellant

vs.

THE CITY OF ROCHESTER
Respondent

APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

The appellant, pursuant to *United States Supreme Court Rule* (13) 2 and 15, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment of the Minnesota Supreme Court, upholding the constitutionality of the Minnesota Statutes pertaining to the construction of public improvements, to-wit, sewers, water mains and water towers, and assessing the property owners for the cost thereof.

OPINION BELOW

The opinion of the Supreme Court of Minnesota, affirming the judgment of the District Court, is reported in 165 N.W. Rep. 2d Series, p. 699.

JURISDICTION

The appeal herein is from a final judgment of the Supreme Court of the state of Minnesota, upholding the constitutionality of a Minnesota Statute relating to the construction of public improvements and assessing the property owners for the cost thereof pursuant to the 1953 Minnesota Statutes, and amending *Minnesota Statute*, Sections 429.01 to 429.18 of Volume 25 of Minnesota Statutes Annotated (Sections 429.011 to 429.111, including Section 429.081, this being the Pocket Part for use in the year 1969, Appendix B, p. 1).

The City of Rochester, Olmsted County, Minnesota, constructed a sanitary sewer, water main and water tower in the district wherein appellant owned certain city lots and assessed the expenses of said construction against this appellant.

The final judgment appealed from was made and entered on February 28, 1969, and is appended to this statement in Appendix A at pp. 1 to 9 inc. Notice of the appeal was filed in the Supreme Court of the state of Minnesota on April 8, 1969.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment complained of.

28 U.S.C. Sec. 1257 (2).

The following decisions are believed to sustain the ju-

risdiction of the Supreme Court of the United States to review on direct appeal there from:

American Oil Company v. Neil, 380 U.S. 451 (1965);
Bantam Books, Inc., et al. v. Sullivan, 372 U.S. 58 (1962);
Cramp v. Board of Pub. Inst., Orange County, Fla., 368 U.S. 278 (1961);
People of State of Illinois v. Board of Education, 333 U.S. 203 (1947);
Standard Oil Co. of California v. Johnson, 316 U.S. 48 (1942).

The Minnesota Statute involved is Sections 429.011 to 429.111 (and particularly Section 429.081 of the *Laws of 1953*, as appears in the Pocket Part of the Minnesota Statutes Annotated, Volume 25.

The text of this statute is set out verbatim in Appendix B. p. 1.

QUESTIONS PRESENTED

(1) Does Section 429.081 of the *Minnesota Statutes* for the year 1953, which provides that the aggrieved property owner has twenty days to appeal to the District Court from the adoption of the assessment by the Common Council but makes no provision of any nature for notice to the property owner of the adoption starting this twenty-day period to appeal, violate the rights of the property owner as to the notice required by the due process clause of the 14th Amendment to the United States Constitution?

(2) Does the fact that the City Council gave notice that on April 6, 1964 they would consider the assessment, at

which hearing a representative from the appellant appeared, and then the amount of the assessment not being approved and the special assessment not being made until June 1, 1964, satisfy the defect in Section 429.081 in not providing for a notice to the property owner of the approval and confirmation of the assessment, starting the twenty-day period in which to appeal (see Section 429.061, Appendix C, pp. 1, 2, 3), and it appearing from the record that nothing was done in the way of continuance of the hearing after April 6, 1964 or any notice given to appellant as required by said statute and Section 429.061 has no provision for notice to the property owner of the adoption of the assesssment or that the adoption has taken place. (See reply brief page 13, paragraph 1.)

(3) Does Section 429.081 of *Minnesota Statutes* of 1953, by failing to provide notice to the property owner, stating that the assessment has been adopted, violate the due process clause of the 14th Amendment to the United States Constitution (Appendix B, p. 1)?

STATEMENT OF CASE

The City of Rochester, situated in the county of Olmsted, state of Minnesota, in the year 1964 constructed a sanitary sewer system, a water main, and water well and tower in the vicinity wherein this appellant owned several tracts of land and assessed the claim of benefits against this appellant, all under claimed Minnesota statutory authority; that this was brought under *Minnesota Statutes Annotated,* as amended, in 1953, Sections 429.011 to 429.111, as appears in Volume 25 thereof, Cumulative Annual Pocket Part to Minnesota Statutes Annotated, to be used in the year 1969, providing as follows (429.081):

> "Within 20 days after the adoption of the assessment, any person aggrieved may appeal to the district court by serving a notice upon the mayor or clerk of the municipality. The notce shall be filed with the clerk of the district court within ten days after its service."

This statute is entirely dearth of any provision giving to the property owner notice as to when the confirmation or adoption takes place or when the 20-day period will start to run. Nothing in said statute makes such provision.

The City of Rochester levied an assessment against this plaintiff-appellant in the sum of $17,781.78. This was confirmed on June 1, 1964 (R. p. 7, f. 1). This was pursuant to a hearing noted for April 6, 1964 (R. p. 5, f. 3). No provision is in the record as to any continuances. An emissary from the plaintiff-appellant appeared at this hearing, it being held under Section 429.061 of said *1953 Amendment*, which provided that the council would meet to consider this assessment, that at this April 6, 1964 meeting they only considered the assessment and made no confirmation until June 1, 1964 (R. p. 7, f. 1) see *supra*.

The Statute of 1953 provided that the aggrieved property owner had 20 days to appeal from the adoption by the City of the assessment, which statute was entirely dearth of any notice of any nature, advising the property owner that the adoption had taken place, thereby starting the 20-day period in which to appeal and thereby eliminating the most important element of the due process clause required by the 14th Amendment as heretofore stated.

Imperial Refineries appealed to the District Court, and at the opening of the trial the City of Rochester moved to dismiss, claiming it as an untimely appeal under Section 429.081 of said *1953 Amendment*. At this early stage,

Imperial Refineries (R. p. 36, f. 1) attacked the constitutionality of this Section 429.081 as violating the due process clause of said 14th Amendment. The court took the motion under advisement (R. p. 36, ff. 1 and 2). This was not decided until the findings made April 8, 1967 (R. p. 109, f. 1). A motion for substituted findings or a new trial assigned as error the finding that this statute 429.081 was constitutional (R. p. 116, f. 3). The same assignment was carried on into the Supreme Court of Minnesota by plaintiff-appellant's brief, page 7 thereof, the Supreme Court of Minnesota holding that this section of the statute does not violate the Constitution of the United States under the 14th Amendment.

RESUME

As Section 429.081 of the *1953 Amendment* deprives the plaintiff-appellant, Imperial Refineries of Minnesota, Inc., of any notice that this assessment has been adopted and starting the 20-day period, or stating the 20-day period is about to start, it deprives this plaintiff-appellant of the due process clause granted by said 14th Amendment.

The judgment and confirmation was entered on February 28, 1969, affirming the order of the trial court, which held said Section 429.081 as being constitutional. The order denying a rehearing was entered on March 28, 1969. The notice of appeal to the United States Supreme Court was filed with the Clerk of the Supreme Court of the state of Minnesota on April 9, 1969.

The statutory provisions believed to give this Court jurisdiction of this appeal is *28 U.S.C.*, Section 1257-(2).

The matter was appealed to the District Court of Olmsted County, and in chambers before the trial started the

defendant-respondent moved to dismiss on the ground that the appeal was not timely under Section 429.081, *Minnesota Statutes Annotated*. Thereat, the plaintiff-appellant immediately attacked the validity of this statute (R. p. 35, f. 3; p. 36, f. 1). The court took this under advisement (R. p. 36, ff. 2 and 3) and proceeded to hear the cause. The same question was carried during the consideration of the case. The court made findings in 1967 (R. p. 109, f. 1), holding that this statute, to-wit, 429.081, was constitutional (R. p. 107, f. 2).

In the motion for substituted findings or for a new trial, one assignment was the findings as to the constitutionality of this statute (R. p. 116, f. 3), and said findings were charged as erroneous. The motion was denied and appealed to the Supreme Court of Minnesota. One assignment of error in Supreme Court was the holding that this statute was constitutional (plaintiff-appellant's brief, p. 7). The Supreme Court of the state of Minnesota held that this statute is valid (see Appendix A).

The contention is that the question presented here is that the statute, as written, violates the due process clause of the 14th Amendment to the Constitution of the United States, and the contention is substantial in that the municipalities all over Minnesota are constructing water and sewer mains and water towers, and the question as to whether the property owners are protected by the statute is a most serious question and that these same questions will continually arise to the detriment of many property owners.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The statute in question governs the procedure in all of Minnesota relating to the construction of sewers, water mains and water towers. This is continually being done. The same questions can arise from day to day, causing no end of litigation. This question should be settled. These facts and this question are very substantial.

CONCLUSION

From the foregoing reasons the appellant respectfully submits that this Court has jurisdiction of this appeal under the provisions of Title 28, *U.S.C.* Sec. 1257-(2).

Respectfully submitted,

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Attorney for Plaintiff and Appellant

Dated May —, 1969.

Marshall S Snyder
admitted
March 8t 1934

APPENDIX A

In The Supreme Court
Of The United States Of America

No. 251

IMPERIAL REFINERIES OF MINNESOTA, INC.,
Appellant,

vs.

CITY OF ROCHESTER,
Respondent.

SYLLABUS

1. Minn. St. 429.081, which directs the procedure for appealing from the adoption of an assessment by a city council, is not rendered unconstitutional by its failure to provide for notice of the final action of the council, since the provisions of §§ 429.031 and 429.061 require notice of the hearings at which the assessment is to be considered.

2. The fact a city clerk erroneously specified to an attorney for a property owner the statute under which the city council proposed to levy an assessment did not estop the city from denying it was proceeding in that manner where the attorney in his inquiry to the clerk had alluded to the statute designated by the clerk although such statute had long since been repealed.

3. The fact that an assessment levied for sewer and water improvements against county fairgrounds was disproportionate to that levied against other property did not render the proceedings invalid where the evidence disclosed that the benefits were dissimilar, and, because the fairground was beyond the jurisdiction of the municipality, the assessment against it was voluntarily assumed.

Affirmed.

Heard before Knutson, C. J., and Otis, Rogosheske, Sheran, and Peterson, JJ.

OPINION

OTIS, Justice.

This is an appeal from a judgment of the District Court affirming an assessment by the City of Rochester for sanitary sewer and water main improvements and for water tank and connecting trunkline improvements amounting to approximately $19,000.

Three issues are raised. First, whether the failure to provide for notice of the adoption of the assessment by the City Council renders Minn. St. 429.081 unconstitutional; second, whether the City Clerk's erroneous designation of the statute under which the City was proceeding constitutes an estoppel; and third, whether the assessments for construction of a water tower were properly allocated.

1. The sanitary sewer and water tank projects were initiated by the City Council in 1961 pursuant to Minn. St. 429.031, Subd. 1, without a petition of abutting owners. The appellant, hereafter referred to as Imperial, was the owner of property in the Golden Hill Addition of Rochester affected by these proposals. It was given notice of a

public hearing on the proposed assessment for sewer and water mains to be conducted on April 6, 1964, by the council. A representative of Imperial appeared at that hearing and protested the assessment. A similar hearing with respect to the water tower was held on December 7, 1964, and was also attended by representatives of Imperial, including its counsel.

The assessment as to the water tank was adopted by the council on January 18, 1965. Imperial served notice of appeal to the District Court on the City of Rochester on February 9, 1965, and filed the notice with the Clerk of Court on February 23, 1965. With respect to the water and sewer project, the assessment roll was adopted by the council on June 1, 1964. Notice of that proceeding was acknowledged by Imperial on June 12, 1964. However, it did not serve notice of appeal until July 17, 1964.

Although the District Court held that the notice of appeal with respect to the sewer and water main project was not timely served on the City of Rochester or filed with the Clerk of Court, and that the notice of appeal was respect to the water tank project was not timely filed with the Clerk of Court, it nevertheless heard the appeals on the merits and made findings of fact and conclusions of law accordingly.

Section 429.081 provides in part as follows:

> "Within 20 days after the adoption of the assessment, any person aggrieved may appeal to the district court by serving a notice upon the mayor or clerk of the municipality. The notice shall be filed with the clerk of the district court within ten days after its service."

Because appellant had no notice of the date to which the

final council hearing relative to each project was continued and in order to have a decision on the merits, the City made no issue of the timeliness of the appeals to the District Court. Nevertheless, it is the contention of Imperial that § 429.081 violates the Fourteenth Amendment in that it fails to provide for notice of the confirmation of the assessment. In support of its contention, Imperial cites Meadowbrook Manor, Inc. v. City of St. Louis Park, 258 Minn. 266, 104 N. W. 2d 540. The Meadowbrook case involved an assessment for a sewer project serving the City of St. Louis Park but constructed in the City of Minneapolis, for which property owners in St. Louis Park were assessed without being served with notice except by publication. We held the proceedings unconstitutional and suggested the kind of notice which would correct that infirmity. In response to the Meadowbrook decision, the legislature by L. 1961, c. 525, adopted the notice provisions in Minn. St. 429.031 and 429.061. As amended, the statute now requires notice to be mailed to affected owners advising them of the public hearing on the proposed improvement and of the hearing on the amount to be assessed.

Imperial contends that neither actual notice nor the fact that it was accorded a hearing in District Court on the merits gives vitality to the statute under which the City proceeded if there is a failure to provide for notice of the confirmation, citing Gove v. County of Murray, 147 Minn. 24, 25, 179 N. W. 569, 570. We do not agree.

Although there is some question as to whether the council complied with the statute by stating the date to which it intended to adjourn at the conclusion of its hearing on the ceedings can only be instituted by a petition of 51 percent

of the affected property owners rather than by the action of the City Council, as was done.

There is no merit in this position. In the first place, the error was invited by counsel and not volunteered by the City Clerk. In the second place, whether the erroneous citation of a statute by the clerk might be fatal under different circumstances, it cannot be invoked to defeat these proceedings where the statute cited had long since been repealed and the information was furnished to one who is learned in the law. We hold, therefore, that Imperial was not misled by the information furnished either as to the law or as to the facts.

3. Finally, Imperial complains that as to the sewer and water main project the assessment levied against it was disproportionate to that levied against the county fairgrounds and that as to the water tank project it received no special benefit not generally realized by the City as a whole.

No authority is cited for authorizing an assessment against the county fair property which was located outside of the City limits of the City of Rochester. Imperial argues that the same situation prevailed in the Meadowbrook case. There, however, the City of St. Louis Park was assessing benefits to property within its own city limits, although the improvement was constructed in the City of Minneapolis for use by the city of St. Louis Park. Here the City of Rochester had no jurisdiction over the fairgrounds, but the county board voluntarily consented to assume an assessment proportionate to the benefits it realized. The fairgrounds were already served by a sanitary sewer and had some water service.

It is the contention of Imperial that for purposes of assessing costs of the water main the fairgrounds had 2.634 front feet, and 1,287 front feet for sewer purposes, for which the fairgrounds was assessed only $7,300. Imperial's frontage, on the other hand, was only 1,100 feet for which they were assessed in excess of $18,000. In disposing of this objection, the trial court made the following findings and conclusions which we hold to be supported by the evidence:

> "The lands comprising the Olmsted County Fairgrounds were outside the territorial limits of the City of Rochester at the time the local improvements involved in this proceeding were initiated by the Common Council and at the time assessments were levied and are still outside the territorial limits of the City. The Board of County Commissioners of Olmsted County, Minnesota voluntarily assumed and agreed to pay the cost on a front foot basis of extending the water main along the east side of the fairgrounds property and into the fairgrounds. This extension of the water main past the fairground lands was necessary to provide an adequate supply of water to appellant's land and the other lands in Golden Hill Addition and Garden Acres served and benefited by the improvements. Except as voluntarily agreed and assumed by the Olmsted County Board, the fairground lands were not presently assessable for any portion of the cost of the improvements which are the subject of this appeal.
>
> "The Common Council reasonably determined that no benefits accrued to the Olmsted County Fairgrounds property from the sanitary sewer and water

main improvement beyond the amount voluntarily paid by the County Board for the water main extension along the east side of the fairgrounds property. Sanitary sewer and water main had already been installed to serve the fairgrounds property and the extension of the sanitary sewer through the fairgrounds was for the purpose of providing service to appellant's property and other properties in Golden Hill Addition and Garden Acres served and benefited by the sanitary sewer improvement.

* * * * *

"That the determination of the Common Council of the City of Rochester of properties benefited by the local improvements involved in these appeals is fair, reasonable and accurate. The treatment of the Olmsted County Fairgrounds property was not arbitrary or capricious and must be considered valid and reasonable in the light of all circumstances, including the deferment of a substantial portion of the cost of the water tank and connecting trunk line improvement to be subsequently assessed against benefited properties not presently assessable."

In Village of Edina v. Joseph, 264 Minn. 84, 92, 119 N. W. 2d 809, 815, we held that a City Council is presumed to assess only for special benefits and not for general benefits accruing to the public at large. We went on to say that courts may not substitute their judgment for that of the municipality, that apportionment of assessments is a legislative function which is prima facie valid, and is conclusive on the courts unless the property owner sustains its burden of proving the assessment to be invalid. In the instant case

appellant has failed to sustain that burden, and the judgment of the trial court is therefore affirmed.

Affirmed.

(Title of Cause.)

PETITION

March 28, 1969

(Petition denied)

SIR:

You will please take notice that on this date the following order was entered in the above-entitled cause:

Ordered, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

MAE SHERMAN,
Clerk Supreme Court.

APPENDIX B

429.081 Appeal to District Court:

"Within 20 days after the adoption of the assessment, any person aggrieved may appeal to the District Court by serving a notice upon the mayor or clerk of the municipality. The notice shall be filed with the clerk of the District Court within ten days after its service. The municipal clerk shall furnish appellant a certified copy of objections filed in the assessment proceedings, the assessment roll or part complained of, and all papers necessary to present the appeal. The appeal shall be placed upon the calendar of the next general term commencing more than five days after the date of serving the notice and shall be tried as other appeals in such cases. The court shall either affirm the assessment or set it aside and order a reassessment as provided in section 429.071, subdivision 2. If appellant does not prevail upon the appeal, the costs incurred shall be taxed by the court and judgment entered therefor. All objections to the assessment shall be deemed waived unless presented on such appeal. Laws 1953, c. 398 § 8, as amended Laws 1961, c. 525, § 9."

APPENDIX C

429.061 Assessment procedure:

"Subdivision 1. Calculation, notice. At any time after a contract is let or the work ordered by day labor, the expense incurred or to be incurred in its making shall be calculated under the direction of the council. The council shall then determine by resolution the amount of the total expense the municipality will pay, other than the amount, if any, which it will pay as a property owner, and the amount to be assessed. Thereupon the clerk, with the assistance of the engineer or other qualified person selected by the council, shall calculate the proper amount to be specially assessed for the improvement against every assessable lot, piece or parcel of land, without regard to cash valuation, in accordance with the provisions of section 429.051. The proposed assessment roll shall be filed with the clerk and be open to public inspection. The clerk shall thereupon, under the council's direction, publish notice that the council will meet to consider the proposed assessment. Such notice shall be published in the newspaper at least once and shall be mailed to the owner of each parcel described in the assessment roll. For the purpose of giving mailed notice under this subdivision, owners shall be those shown to be such on the records of the county auditor or, in any county where tax statements are mailed by the county treasurer, on the records of the county treasurer; but but other appropriate records may be used for this purpose. Such publication and mailing shall be no less than two weeks prior to such meeting of the council. Except as to the owners of tax exempt property or

property taxes on a gross earnings basis, every property owner whose name does not appear on the records of the county auditor or the county treasurer shall be deemed to have waived such mailed notice unless he has requested in writing that the county auditor or county treasurer, as the case may be, include his name on the records for such purpose. Such notice shall state the date, time, and place of such meeting, the general nature of the improvement, the area proposed to be assessed, that the proposed assessment roll is on the file with the clerk, and that written or oral objections thereto by any property owner will be considered.

"Subdivision 2. Adoption. *At such meeting or at any adjournment thereof the council shall hear and pass upon all objections to the proposed assessment*, whether presented orally or in writing. The council may amend the proposed assessment as to any parcel and by resolution adopt the same as the special assessment against the lands named in the assessment roll. *Notice of any adjournment of the hearing shall be adequate if the minutes of the meeting so adjourned* show the time and place when and where the hearing is *to be continued, or if three days notice thereof be published in the newspaper*. The assessment, with accruing interest, shall be alien upon all private and public property included therein, from the date of the resolution adopting the assessment, concurrent with general taxes; but the lien shall not be enforceable against public property as long as it is publicly owned, and during such period the assessment shall be recoverable from the owner of such property only in the manner

and to the extent provided in section 435.19. All assessments shall be payable in equal annual installments extending over such period, not exceeding 30 years, as the resolution determines. The first installment shall be payble on the first Monday in January next following the adoption of the assessment unless the assessment is adopted too late to permit its collection during the following year. All assessments shall bear interest at such rate as the resolution determines, not exceeding six percent per annum. To the first installment shall be added interest on the entire assessment from the date of the resolution levying the assessment until December 31 of the year in which the first installment is payable. To each subsequent installment shall be added interest for one year on all unpaid installments." Note this statute makes no provision for notice to the property owner of the adoption of the assessment starting the 20 day period to appeal.